STATE OF MICHIGAN

COURT OF APPEALS

B & L DEVELOPMENT LLC, Petitioner-Appellee,	UNPUBLISHED August 14, 2014
v	No. 311183 Tax Tribunal
CITY OF NORTON SHORES, Respondent-Appellant.	LC No. 00-365860

Before: SAAD, P.J., and OWENS and K. F. KELLY, JJ.

PER CURIAM.

Respondent-appellant, the City of Norton Shores, appeals as of right from a judgment of the Michigan Tax Tribunal (MTT), which adopted the valuation offered by petitioner-appellee, B & L Development, LLC, in its appeal from property tax assessments levied by respondent for tax years 2009 and 2010. Finding no errors warranting relief, we affirm.

I. BASIC FACTS

Robert and Lois Richmond owned B & L Development. A systems engineer by trade, Robert became involved in property development in 1992 when he bought land and developed an industrial building for a friend who was in the plastics industry. While he was in the process of developing the property, rumors were swirling of an interchange at Sternberg Road and US 31. As an investment, the Richmonds began acquiring property along Sternberg. The property at issue in this appeal is on the north side of Sternberg Road. In 2002, the Richmonds developed the subject into a strip center – The Pointes Shopping Center. A much larger mall – the Lakes Mall – was developed east of Richmond's property. There were several "big" retail stores located to the south and south east of the subject -- Toys R Us, Meijer, Old Navy, etc. There was little development near the subject. Robert believed that the subject was large enough (56,000 square feet) that it could be set back from the road and still do well. He believed the larger Lakes Mall would increase traffic to the subject's benefit. But later, Robert got comments from tenants that customers were having difficulty finding their businesses because of the lack of visibility. Robert did not believe that the Lakes Mall was a detriment to the subject, but all of the development near the subject property was industrial.

The original assessment found a true cash value for 2009 at $6,175,432 and for 2010 $5,891,503. As a result of the appeal, respondent offered a revised true cash value of $5,350,000 for 2009 and $5,000,000 for 2010. Petitioner contended that the true cash value of the subject

property was $3,800,000 for 2009 and $3,230,000 for 2010. They each offered expert witness testimony to support the valuations. Petitioner's expert, Laurence G. Allen, testified that the character of the property and its location resulted in a low valuation. Respondent's expert, Elden Nedeau, disagreed and believed the location and character of the property were fine. He intimated that it was the Richmonds' management that caused them to be unable to secure tenants. The MTT adopted petitioner's valuation and found that the true cash value for 2009 was $3,800,000 and $3,230,000 for 2010. Respondent now appeals as of right.

II. STANDARD OF REVIEW

"A proceeding before the tribunal is original and independent and is considered de novo." MCL 205.735a(2). "In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation." Const 1963, art 6, § 28. "Appellate review of the tribunal decision is limited. Unless fraud is alleged, an appellate court reviews the decision for a misapplication of the law or adoption of a wrong principle. The tribunal's factual findings are deemed conclusive provided they are supported by competent, material, and substantial evidence on the whole record." *Podmajersky v Dep't of Treasury*, 302 Mich App 153, 162; 838 NW2d 195 (2013) (internal citation and quotation marks omitted). "This Court may review the tribunal's rulings regarding evidentiary issues if they involve errors of law." *Georgetown Place Co-op v City of Taylor*, 226 Mich App 33, 50; 572 NW2d 232 (1997) (footnotes omitted). The appellant bears the burden of proof in an appeal from the MTT. *Podmajersky*, 302 Mich App at 162.

"The preliminary determination of the qualification of an expert is an issue for the trial court to decide. Thus, the qualification of a witness as an expert and the admissibility of the testimony of the witness are in the trial court's discretion and we will not reverse on appeal absent an abuse of that discretion. An abuse of discretion exists if the decision results in an outcome outside the range of principled outcomes." *Surman v Surman*, 277 Mich App 287, 304-305; 745 NW2d 802 (2007).

III. ANALYSIS

Respondent argues that the MTT abandoned its role as a gatekeeper for expert testimony when it permitted Allen to testify and without properly scrutinizing Allen's data and methodology. Respondent further argues that the MTT failed to perform an independent valuation of the subject and simply "rubber stamped" petitioner's valuations. We disagree on both counts.

This matter came before the MTT upon petitioner's allegation that respondent assessed the property in excess of 50 percent of its true cash value. If true, the allegation would run contrary to Const 1963, art 9, § 3, which provides:

> The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for school operating purposes. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such

> property shall be uniformly assessed, which shall not, after January 1, 1966, exceed 50 percent; and for a system of equalization of assessments.

"True cash value" is defined as: "the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale." MCL 211.27. "The concepts of 'true cash value' and 'fair market value' in this state are synonymous" and, as such, "[a]ny method for determination of true cash value which is recognized as accurate and reasonably related to fair market valuation will fill the statutory prescription and is an acceptable indicator of true cash value." *CAF Inv Co v Tax Commission*, 392 Mich 442, 450 n 2; 221 NW2d 588 (1974).

Importantly, it is the petitioner who bears the burden of proof in establishing the true cash value of the property. MCL 205.737(3). "This burden encompasses two separate concepts: (1) the burden of persuasion, which does not shift during the course of the hearing, and (2) the burden of going forward with the evidence, which may shift to the opposing party." *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 420; 483 NW2d 416 (1992).

"There are three traditional methods of determining true cash value, or fair-market value, which have been found acceptable and reliable by the Tax Tribunal and the courts. They are: (1) the cost-less-depreciation approach, (2) the sales-comparison or market approach, and (3) the capitalization-of-income approach." *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 484-485; 473 NW2d 636 (1991). "The values derived under the various approaches are correlated, reconciled, and weighed in order to reach a final estimate of value. The ultimate goal of the valuation process is a well-supported conclusion that reflects the study of all factors that influence the market value of the subject property." *Id.* at 485-486. "The [MTT] is under a duty to apply its expertise to the facts of a case in order to determine the appropriate method of arriving at the true cash value of property, utilizing an approach that provides the most accurate valuation under the circumstances." *Great Lakes Div of Nat Steel Corp v City of Ecorse*, 227 Mich App 379, 389; 576 NW2d 667 (1998). To that end, the MTT "is not bound to accept the parties' theories of valuation. It may accept one theory and reject the other, it may reject both theories, or it may utilize a combination of both in arriving at its determination of true cash value." *Id.* at 389-390.

Here, both experts and the MTT agreed that only the sales-comparison and capitalization of income approaches applied and that the capitalization of income approach was the most determinative of true cash value.

> This approach to value is based on the premise that a property's value is related to how much income the property can earn, rather than the owner's occupancy of the property. Because the main benefit to the owner is the future net income that the property can earn, the property's worth is largely based on the income, although the net amount receivable from the property when the ownership is terminated is also a benefit. The capitalization-of-income approach measures the present value of the future values of the future benefits of property ownership by estimating the property's income stream and its resale value (reversionary interests) and then developing a capitalization rate which is used to convert the estimated future

> benefits into a present lump-sum value. [*Forest Hills Co-op v City of Ann Arbor*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 305194 and 306479, issued June 12, 2014), slip op, p 10 (internal quotation marks and citations omitted).]

For leased or rented property, "present economic income" means "the ordinary, general, and usual economic return realized from the lease or rental of property negotiated under current, contemporary conditions between parties equally knowledgeable and familiar with real estate values. The actual income generated by the lease or rental of property is not the controlling indicator of its true cash value in all cases." MCL 211.27(4).

As a preliminary matter, respondent complains that the MTT erred in failing to act as "gatekeeper" in admitting Allen's appraisal and allowing him to testify. "To ensure that a petitioner is afforded due process, hearings in the [MTT] are conducted in accordance with the provisions of Chapter 4 of the Administrative Procedures Act, MCL 24.271 *et seq*., . . ." *Georgetown Place Co-op*, 226 Mich App at 51-52. It is imperative that the parties "be given the opportunity to present evidence and arguments regarding issues of fact, cross-examine witnesses, and submit rebuttal evidence." *Id.* at 52. To that end "[t]he rules of evidence must be followed as far as practicable . . ." *Id.*

MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

"The preliminary determination of the qualification of an expert is an issue for the trial court to decide." *Surman*, 277 Mich App at 304. MRE 702 "impose[s] an obligation on the trial court to ensure that any expert testimony admitted at trial is reliable." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004). And "[w]hile the exercise of this gatekeeper role is within a court's discretion, a trial judge may neither abandon this obligation nor perform the function inadequately." *Id.* (internal quotation marks omitted). A court may admit evidence only after it confirms that the expert testimony meets the standard of reliability. *Id.* at 782.

> This gatekeeper role applies to all stages of expert analysis. MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. [*Id.*]

However, "[d]isagreements pertaining to an expert witness's interpretation of the facts are relevant to the weight of that testimony and not its admissibility." *Lenawee Co v Wagley*, 301 Mich App 134, 166; 836 NW2d 193 (2013). Thus, the trial court should take care not to weigh the proffered testimony when determining whether a witness is qualified as an expert. *Surman*, 277 Mich App at 309. "[A] trial court's doubts pertaining to credibility, or an opposing party's disagreement with an expert's opinion or interpretation of facts, present issues regarding the weight to be given the testimony, and not its admissibility" and any "[g]aps or weaknesses in the witness' expertise are a fit subject for cross-examination, and go to the weight of his testimony, not its admissibility." *Id.* (internal quotation marks omitted).

Prior to the hearing, respondent moved to exclude the valuation opinion of petitioner's expert, Laurence Allen. Respondent complained that Allen's opinion amounted to a "junk appraisal" and that, in keeping with MRE 702, the MTT was required to act as gatekeeper in the same manner it would for "junk science." Respondent did not contest Allen's qualification to offer an opinion, but questioned the "reliability of the specific opinion itself." The underlying data and the manner in which an expert interprets that data must be valid. Respondent argued that experts with "unreliable opinions" should be prevented from testifying and that the MTT should set forth "a full and throaty announcement to the tax bar, that reliability standards will be actively enforced by the MTT, as a pre-condition for expert opinions being admitted in evidence." This would be a signal to the contingent-fee bar and promote settlement "by reducing the perverse incentive for petitioners to submit 'lowball' defective appraisals." Respondent argued that such opinion testimony was not a matter of evidentiary weight, but a matter of admissibility in the first place. Respondent argued:

> Again, it is important to understand that the issue of reliability is completely separate from the question of the expert's own qualifications or credentials. Even a highly-educated expert, with a multitude of professional certifications – especially if the financial incentives are right – still can offer an opinion that is based on unreliable factual premises, or that adopts an unreliable methodology, or that applies a methodology to facts, in an unreliable manner. The issue for the MTT to review involves the content of the particular opinion itself, and the method the expert used to arrive at it. The expert's qualifications or credentials are an unrelated side-issue, when it comes to making the Rule 702 reliability determination.

Respondent pointed to two recent MTT decisions where the MTT rejected Allen's "quality point methodology." Respondent complained that Allen took into consideration the vacancy and collection loss expense in calculating income and then took a "stabilization" deduction from value and that his methods resulted in a "double dip" lowball valuation. Respondent argued that Allen's comparables reflected his attempts to lowball valuation. Respondent requested the opportunity to voir dire Allen to ensure that "his data, methodology and application of method to data, actually meet the minimum standard of reliability."

During opening statements on the first day of the four-day hearing, respondent's attorney noted that "more cases will settle if we have appraisals that come in that are more objective, that are less for advocacy purposes. It will reduce the number of really bad appraisals, if the Tax Tribunal starts acting as a gatekeeper." Counsel stated that Allen's appraisals had been deemed

unreliable in a third of the cases in which he rendered an opinion. Counsel warned that "[a]t some point we have to say, yeah, this really is advocacy and not appraisal . . ."

On the second day of the hearing, respondent's attorney, Eric Grimm, sought to voir dire Allen. Specifically, Grimm complained that Allen, in including comparables for the subject property, was utilizing a value-in-use approach as opposed to a market value approach. Grimm wanted an opportunity to examine Allen's methodology "so that the Court can have adequate information to determine whether there is actual reliability here." Grimm did not contest Allen's credentials: "I'm not going to say that he is unqualified to offer any opinion, ever. I'm saying that there's a problem with this opinion." Counsel for petitioner, Steven Schneider, strongly disagreed and argued that the issue was what weight to give the appraisal, not its admissibility. The trial court ruled as follows:

> I have given consideration to Respondent's motion for immediate consideration in regards to the exclusion of Petitioner's valuation expert. And at this juncture the buzz words that have swirled around quite often to this point as far as gatekeeping and independent determination of value are necessary, relevant, pertinent.
>
> The Tribunal's independent determination does not start and end at this juncture. In order to have an independent determination the Tribunal is going to receive this exchanged information, the valuation disclosures, to give it the weight and credibility that it requires. In order to do that the Tribunal has every reason and effort to not only receive this information but hear testimony on it.
>
> It's not going to be an all or nothing situation where the Tribunal is going to, based on this motion, say, we're not going to allow Mr. Allen's report or Mr. Allen's testimony. There's not enough to persuade the Tribunal to act in that fashion at this very moment.
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> ***
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> There is enough that has been presented for the – for the Tribunal to weigh and consider Mr. Allen's valuation disclosure and testimony and to bring it all together for an independent determination to write an opinion. And that's the way we're going to proceed.
>
> I don't know what – what you need to do to voir dire at this point. I don't even know that it is going to be helpful in any regard. Your case will be your case. When you take center stage and you want to present cross-examination to Mr. Allen, you'll have full avail to do so. And all the points that you've raised in this motion you'll have opportunity to do so then. For me to act on this all now – this reads as your case. Why wouldn't you cross-examine Mr. Allen on all these points that you've raised in your motion?

The trial court accepted Allen as an expert and received his valuation disclosure into evidence.

Later, Grimm cross-examined Allen about his methodology. The following exchange took place:

> *Q.* Yeah, but that wasn't the question that I asked you. I wasn't asking about how would people value two different properties. What I asked was, performing the same process, two equally qualified appraisers, or we could say a dozen equally qualified appraisers, do we have a methodology that we can look at and walk through the methodology to say, yeah, it doesn't matter who the appraiser is, doesn't matter what they think the task is, all these qualified appraisers they're going to come up with the same result rather than a range of results?
>
> *A.* Well, you might have a bell-shaped curve, but I think the central tendency would be in the area of my capitalization rate.
>
> *Q.* How do you know? And more importantly, how can the Tribunal know that we can repeat the same process and come up with the same result?
>
> MR. SCHNEIDER: Objection to relevance. Where did this concept of a repeatable process come from? I don't think we're trying to put a new drug into the market. We're trying to figure out whether the drug cures the illness the same way in every person. This is appraisal, appraisal judgment of one property at one time on one date.
>
> JUDGE ABOOD: That would be the key word here is "judgment". Because there are infinite nuances that occur in the market for a given property, and then ultimately how an appraiser captures those nuances and relates it to their opinion of value. So unless you can –
>
> MR. GRIMM: Appraisers are experts just like everyone else.
>
> JUDGE ABOOD: No, this isn't a debate, Mr. Grimm. What I've tried to do is balance this with the objection but at least give you the latitude of asking a more pertinent question, and that's as far as I can go. Now, if you're going to stretch this, we're going to kill a day.

When Grimm further questioned Allen about the "falseifiability" of an appraisal, petitioner's counsel objected again:

> MR. SCHNEIDER: Objection, your Honor. You know, he has these things up here, testable, repeatable, falsifiable, peer reviewed. Where did those things come from? What is the standard he's trying to get? We don't see any foundation here or relevance so I'd like to see relevance. And I can appreciate you giving him broad range on this, but it's clear that the witness is a bit confused with the concept for falsifiable as it goes to appraisal, and I am, too.
>
> MR. GRIMM: It applies to all expert testimony, and it comes from the Michigan Supreme Court and the United States Supreme Court. Those are what

is listed in Gilbert and the Daubert cases as the badges of reliability, the four things that we look at. The four things on which the Petitioner has the burden of proof as to whether or not the methodology is actually a reliable methodology as opposed to a biased methodology.

My basic question here is, how do we determine – how can we determine it in a way that we can actually articulate? How do we separate the wheat from the chaff, the lambs from the goats? How do we separate the reliable from the biased?

JUDGE ABOOD: Okay. And that's understandable.

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JUDGE ABOOD: You've related it as far as case law, and that's understandable. However, I would ask or direct you to relate it to appraisal practice and appraisal theory.

In its Opinion and Order, Judge Abood rejected Grimm's concerns regarding Allen's expert opinion:

> Respondent cites *May Company v* Taylor, 16 MTT 266, in support of its argument. Contrary to Respondent's implication, the Tribunal in that case overruled Respondent's objection to the admission of the petitioner's appraisal stating "the question of whether Petitioner's principles and methodology are reliable would be dealt with in this Opinion and Judgment." 16 MTT 266, 278. Further the Supreme Court in *Gilbert v DaimlerChrysler*, 468 Mich 883, 661 NW2d 232 (2003),[1] states "MRE 702 [provides] the factors that a court may consider in determining whether expert opinion evidence is admissible. It . . . [is] the court's fundamental duty of ensuring that *all* expert opinion testimony – regardless of whether the testimony is based on 'novel' science – is reliable." In that case, "the faux 'medical' opinion of an individual who lacked any medical education, experience, training, skill, or knowledge became the linchpin of plaintiff's case and unmistakably affected the verdict." In the present case, there is no question. Petitioner's appraiser is qualified by education, experience, training, skill, and knowledge to perform an appraisal. Further the Tribunal is satisfied that both the testimonial and documentary evidence provided is not only based on sufficient facts and data, but also is the product of reliable principles and methodologies, which were reliably applied to the specific facts of this case.

We agree. Respondent relies heavily on *Gilbert*, but, as the judge noted, that case is readily distinguishable from the case at bar. In *Gilbert*, the plaintiff sued her employer for sexual harassment, arguing that the harassment created a permanent change in her brain chemistry,

[1] The correct citation is 470 Mich 749; 685 NW2d 391 (2004).

which caused her to relapse into substance abuse and depression. *Gilbert*, 470 Mich at 753. She presented the "expert" opinion of a social worker who testified that the plaintiff would suffer an untimely and excruciating death. *Id*. "This witness not only lacked any training, education, or experience in medicine, but also testified falsely about his credentials. Nevertheless, plaintiff asked the jury to treat this witness's testimony as a 'prognosis,' and to compensate plaintiff for the loss of her health and, eventually, her life." *Id.* at 753-754. The plaintiff's expert, who was the plaintiff's counselor and testified as both a fact witness and an expert witness, testified that he received a master's degree in psychobiology and also received a prestigious award as an undergraduate. Neither of these claims was true. *Id.* at 759-760. Noting the particular care that must be taken to vet expert testimony that touches on causation, the Court noted, "[w]hen a court focuses its MRE 702 inquiry on the data underlying expert opinion and neglects to evaluate the extent to which an expert extrapolates from those data in a manner consistent with *Davis–Frye* (or now *Daubert*), it runs the risk of overlooking a yawning 'analytical gap' between that data and the opinion expressed by an expert. As a result, ostensibly legitimate data may serve as a Trojan horse that facilitates the surreptitious advance of junk science and spurious, unreliable opinions." *Id.* at 783.

The *Gilbert* court concluded that both the trial court and the Court of Appeals had failed to recognize such core gatekeeper principles. *Id.* at 783. The result was that a social worker who lacked any medical education, experience, training, skill or knowledge was permitted to interpret plaintiff's medical records and offer an "opinion that he was wholly unqualified to give." *Id.* at 784-785. The Court explained:

> Mr. Hnat unquestionably used the content of plaintiff's treatment records to render an opinion that required medical expertise. He speculated about plaintiff's impending physical inability to work, testified about the type of medical complications that plaintiff would soon experience, predicted the cause of her death, and gave testimony concerning plaintiff's life expectancy. Mr. Hnat expressed his "opinion" on physiological disease, cause of death, and plaintiff's lifespan. Yet there was no evidence or showing that Mr. Hnat was qualified by training, experience, or knowledge to render such opinions or interpret medical records that would arguably support such a diagnosis or prognosis. There was, in other words, no evidence that Mr. Hnat was qualified to testify that defendant's actions concerning workplace harassment *caused* neurological and physiological changes in plaintiff and shortened her life. [*Id.* at 787-788.]

Thus, while the witness may have been an expert in social work and substance abuse, "[i]n order for Mr. Hnat to provide an admissible opinion interpreting medical records for purposes other than those related to the expertise of social workers, plaintiff bore the burden of showing that Mr. Hnat was qualified by knowledge, skill, experience, training, or education in *medicine*." *Id.* at 788. His qualification did not go merely to the weight of the evidence, but its admissibility in the first instance. *Id.* "Where the subject of the proffered testimony is far beyond the scope of an individual's expertise . . . that testimony is inadmissible under MRE 702. In such cases, it would be inaccurate to say that the expert's lack of expertise or experience merely relates to the weight of her testimony. An expert who lacks 'knowledge' in the field at issue cannot 'assist the trier of fact.'" *Id.* 789. The Court concluded that the witness's "prognosis" testimony that was based on

his interpretation of the plaintiff's medical records was erroneous because the witness lacked medical training and, therefore, did not have the ability to interpret the records. *Id.* at 789-790.

Here, there is no question that Allen had the sufficient education, experience, training, skill and knowledge to assist the trier of fact in valuing the subject property. Allen was president and chief appraiser at Allen & Associates. He had been a real estate appraiser for 38 years, with 90 percent of his appraisal work in Michigan. Allen appraised a wide variety of properties, including strip shopping centers, regional shopping centers, and industrial properties. Some of his work involved Great Lakes Crossing, Woodland Mall, North Kent Mall, Eastland Mall, and Laurel Park Place. Allen appraised "power centers", which generally included two or more "big box" stores as anchors. He appraised an average of 10 to 20 shopping centers a year. Allen performed appraisals on the Target store in the area as well as the Lakeshore Marketplace. The appraisals were not for tax purposes. Allen also did a significant amount of work for a firm that managed securitized mortgages and also worked with Comerica Bank, performing appraisals for mortgage financing. Allen had his masters in business administration and was a member of the Appraisal Institute, having held positions on its board of directors. He was a Chartered Financial Analyst. Allen lectured on the valuation of real property at the graduate schools of Michigan State University, University of Michigan, and Oakland Community College. Allen had been qualified as an expert on at least 30 occasions in the MTT.

In fact, respondent admits that Allen was *qualified* to testify as to valuation but argues that *Gilbert* requires a court to conduct a searching inquiry into the underlying data. We disagree. *Gilbert's* primary focus was on the fact that the witness was not qualified to offer an opinion. The underlying data[2] was not in dispute. Instead, the Court's focus was on the witness's professional qualifications and whether his background permitted him to offer an interpretation of those records. Therefore, *Gilbert* does little to bolster respondent's argument on appeal.

Respondent also cites this Court's unpublished opinion in *New Michigan, LP v City of Norton Shores*, unpublished opinion per curiam of the Court of Appeals, issued March 3, 2011 (Docket No. 294678).[3] Citing MRE 702 and *Gilbert*, this Court concluded:

> We also reject petitioner's various claims directed at showing that Shipman provided a credible appraisal. While the Tax Tribunal may give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs, the rules of evidence shall be followed as far as practical in a contested case before the Tax Tribunal. In general, every aspect of an expert's analysis, including the underlying data and the manner in which it is interpreted, must be reliable. Giving due deference to the Tax Tribunal's assessment of Shipman's lack of credibility and the unreliability of her conclusions, petitioner has not shown that the Tax Tribunal committed an error of

[2] The plaintiff's medical records.

[3] Unpublished cases are not binding on this Court. MCR 7.215(C).

> law or adopted a wrong principle in finding that Shipman's appraisal lacked credibility or was based on unreliable conclusions. [*New Michigan*, slip op p 4 (internal quotation marks and citations omitted).]

This Court gives a nod to the MTT's need to assess the underlying data and the manner in which it is interpreted, but, importantly, it gives deference to the MTT's assessment of the expert's *credibility* to conclude that her assessment was unreliable. Thus, this Court presupposed the admission of such evidence; the focus was less on the admissibility of the testimony and more on the weight to be given such testimony.

Respondent wanted the trial court to fully scrutinize Allen's testimony before it was even offered. The gist of respondent's argument relates to the interpretation and application of data. However, as previously stated, "[d]isagreements pertaining to an expert witness's interpretation of the facts are relevant to the weight of that testimony and not its admissibility." *Wagley*, 301 Mich App at 166. "[A] trial court's doubts pertaining to credibility, or an opposing party's disagreement with an expert's opinion or interpretation of facts, present issues regarding the weight to be given the testimony, and not its admissibility" and any "[g]aps or weaknesses in the witness' expertise are a fit subject for cross-examination, and go to the weight of his testimony, not its admissibility." *Surman*, 277 Mich App at 309 (internal quotation marks omitted). Respondent complains about Allen's comps, his use of the absorption factor, and his various adjustments for market conditions. These complaints focus on the *weight* of the evidence, not the *admissibility* thereof. Allen was clearly qualified to testify as an expert and he utilized the same approaches to value as respondent's expert. Petitioner was not required to show that Allen's testimony and conclusions were absolutely true or uncontested; the focus was on the method, not the correctness, of his opinion. Allen used well-established methods for determining value. Ironically, in defending its own expert, respondent's counsel said it best: "And we think the Tribunal can exercise its own judgment in terms of which portions are relevant and not relevant. We trust the Tribunal to be able to make that decision and to determine both relevancy and credibility of both valuation disclosures."

Respondent's arguments on appeal focus almost exclusively on the MTT's failure to exclude Allen's testimony and valuation, leaving little else to discuss. Nevertheless, we will briefly touch on respondent's claim that the tribunal judge effectively "rubber stamped" petitioner's valuation and failed to conduct an independent examination of the subject's value and accepted a number of "curious methods" in arriving at the subject's value.

We agree with petitioner that the MTT was under no obligation to "split the baby" or come up with its own valuation numbers that were different from either expert's valuations. Again, the MTT "is not bound to accept the parties' theories of valuation. It may accept one theory and reject the other, it may reject both theories, or it may utilize a combination of both in arriving at its determination of true cash value." *Great Lakes Div of Nat Steel Corp*, 227 Mich App at 389-390. To that end, it is reasonable to conclude that if the MTT adopts an expert's opinion and method, it may likewise adopt the valuation.

Respondent complains about Allen's use of an unconsummated "non-sale" when valuing the vacant land. It complains that such an offer to sell, which took place between the Richmonds and a personal business associate, was not arms-length. Robert testified that there was excess

vacant property that was part of the subject property. The Richmonds were asking $6.00/sq ft. There had been no offers. In 2009 or 2010, Robert approached the developer for Dollar General, whom he knew through other business dealings, and asserted that the vacant parcel would be a good location for the retailer. Robert offered to sell an acre to Dollar General for $70,000. Dollar General did not accept and wound up developing south of the subject property. Robert only had a "scribbled note" from the conversation from talking on the phone and had no other documentation to substantiate the negotiation. Allen used the offer as a comp. The rest of the comps were actual sales. All of the comps were in better locations than the subject. Allen made adjustments in the same way he did for the sales comparison approach, including size and location. Thus, it is clear that the valuation included more than just the offer of sale.

Respondent further complains that the MTT also adopted Allen's "investment value" or "value-in-use" approach rather than performing a proper market valuation and that the subject should have been valued based on the market and not on the subject's "sub-market" performance. Respondent argues that using comps extracted from the subject instead of the market resulted in a skewed and flawed valuation. However, Allen explained that his approach was not value-in-use:

> Because it's the value that a prudent purchaser would pay for the property. Obviously a prudent purchaser looking at the property with sixty-eight percent occupancy is not going to pay the same price as if the property had an eighty-five percent occupancy. A buyer is going to have to buy that property, find additional tenants, lease up the property to that level to receive that value that it will have when it's eighty-five percent occupied. And it doesn't matter who the seller is or who the buyer is. We're assuming prudent buyer, prudent buyer market transaction. Any buyer would pay less for a property that has less than stabilized occupancy.

Respondent also complains that the owners were rewarded for their mismanagement of the property. In concluding his direct examination, Allen testified that he had inspected between 50 to 100 strip centers. He did not find evidence of poor management of the subject property, such as an abnormal amount of tenant departures. On cross-examination, Allen acknowledged that there was a material difference between the Richmonds and the typical professional operator of commercial property. However, even assuming some deficiency in development and management, two properties owned by two different owners – one who is a well-informed market participant and one who proceeds on the theory that "if I build it, they will come" – would not have different valuations because "they would both be purchased by a prudent buyer who would maximize performance of the property." Thus, "who the seller is shouldn't make any difference in the valuation. As long as it's a prudent – as long as the valuation assumes a prudent seller, prudent buyer." But regardless of the reason for the vacancies, a buyer is going to pay less for a less occupied building.

In conclusion, the MTT properly admitted Allen's valuation and testimony during the proceedings. Allen was well qualified and used the same valuation methods as respondent's expert. That respondent disagrees with certain comps and methods goes to the weight, not admissibility, of Allen's opinion. Additionally, the fact that the MTT adopted Allen's appraisal does not mean that it abdicated its obligation to independently value the subject. The MTT

properly considered the conditions at the subject in order to determine what a prospective purchaser might pay under the income-capitalization approach. Evidence of rent rates for the subject was logically related to market value and was valid evidence of how the market perceived the subject. Allen also considered comps that were paid at other area strip malls, giving weight to more than just the rentals at the subject. Respondent is not entitled to relief from the MTT's judgment because there is no evidence of fraud, misapplication of the law, or adoption of a wrong principle.

Affirmed.

/s/ Henry William Saad
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly